UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.

Before
C.L. REISMEIER, B.L. PAYTON-O'BRIEN, J.A. MAKSYM
Appellate Military Judges

UNITED STATES OF AMERICA

v.

JOHN P. KNAPP
LANCE CORPORAL (E-3), U.S. MARINE CORPS

NMCCA 201100556
SPECIAL COURT-MARTIAL

Sentence Adjudged: 24 June 2011.
Military Judge: LtCol Robert Palmer, USMC.
Convening Authority: Commanding Officer, Marine Fighter Attack Squadron 115, MAG 31, 2d MAW, U.S. Marine Corps Forces Command, MCAS Beaufort, SC.
Staff Judge Advocate's Recommendation: Maj V.C. Danyluk, USMC.
For Appellant: LCDR Michael Torrisi, JAGC, USN; Capt Michael Berry, USMC.
For Appellee: LT Kevin Shea, JAGC, USN; Capt Mark Balfantz, USMC.

28 June 2012

OPINION OF THE COURT

THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

REISMEIER, Chief Judge:

A special court-martial composed of members with enlisted representation convicted the appellant, contrary to his pleas, of one specification of wrongful use of cocaine, in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C.

§ 912a. Members sentenced the appellant to confinement for 90 days, reduction to pay grade E-1, forfeitures of $978.00 pay per month for three months, and a bad-conduct discharge. The convening authority approved the sentence as adjudged, and, except for the bad-conduct discharge, ordered it executed.

The appellant assigned one error, arguing that the military judge abused his discretion by admitting the drug laboratory report and by permitting the Government's expert to testify from the report, in violation of the appellant's right to confrontation. We specified two additional issues: whether the judge abused his discretion by allowing members to reconsider their sentence in the absence of a proposal for reconsideration and without a proper instruction, and what remedy would be appropriate if the judge did abuse his discretion. Because of our resolution of this case, we do not reach the assigned or specified issues.

Background

On 7 September 2010, the appellant provided a urine sample. When tested by the Naval Drug Screening Laboratory (NDSL), Jacksonville, Florida, the sample contained the cocaine metabolite benzoylecgonine, or BZE. BZE is produced by the human body as it metabolizes cocaine. The substance is not naturally occurring within the human body. A single charge and specification were referred for trial by a special court-martial on 31 January 2011. The appellant was arraigned on 11 February 2011.

The court reconvened at 1454 on 22 June 2011. After forum selection and the entry of pleas, the members were brought into the courtroom for *voir dire*. Before conducting *voir dire*, the military judge instructed the venire that they could only properly decide the case after hearing all of the evidence and instructions, and may only reach a conclusion of guilty or not guilty in closed deliberations. Record at 29.

Immediately following challenges, and after the military judge announced that the members had departed the courtroom, one of the challenged members initiated an unprofessional exchange, on the record, with the trial defense counsel, saying "You guys don't like me." *Id*. at 123. It is unclear whether other members were present during the exchange.[1] The court then recessed at 1844.

[1] As noted by the Court of Military Appeals, the military judge is required to exercise reasonable control over the proceedings. *United States v. Jones*, 37

Preliminary Instructions

At 1308 on 23 June 2011, the court was called to order with the members already in the courtroom.[2] During his preliminary instructions to the members, the military judge told the members that they were to hold their discussions until they were placed in closed session deliberations.

Instructions on Findings

Upon the conclusion of the evidence, the military judge provided the members with instructions. Included in his instructions was the following:

> If you have at least three votes for guilty, of the offense, then that will result in a finding of guilty, as to that offense. If the three members vote for a finding of not guilty, then your ballot has resulted in a finding of not guilty.

Id. at 349.

No oral instruction was given indicating that a vote which resulted in less than three votes for guilt resulted in an acquittal. No objection was made at trial, no questions were raised by counsel or member, and no changes were made to this portion of the trial transcript.

Article 52(a)(2), UCMJ, requires the concurrence of two-thirds of the members present for voting to reach a finding of guilty, except with regard to offenses not relevant in this case. RULE FOR COURTS-MARTIAL 921(c)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) provides that if fewer than two-thirds of a panel vote for a finding of guilty, the result is a finding of not guilty. Here, the members were orally instructed that an acquittal required a vote of the same majority – three of the four members. Left unstated was that if a vote resulted in less

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M.J. 321, 322-23 (C.M.A. 1993). Included in this requirement is the mandate of RULE FOR COURTS-MARTIAL 813(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 Ed.) that the military judge account for the presence of all parties and members. While military courts have accepted deviations from this requirement under some circumstances, such as where the record suggests that the members performed their duties properly, in view of other procedural irregularities discussed *infra*, we are unable to reach that conclusion in this case.

[2] *See* footnote 1, *supra.*

than that majority – in this case, a split of two-to-two – the result would be an acquittal, triggering the requirement to reopen the court for instructions as to reconsideration if the panel so desired. While we may presume that the members ultimately followed the instruction by reaching a concurrence of at least three of the four members for conviction, we have no way of knowing whether the members reached that conclusion only after voting for an acquittal. We do know that had an initial vote resulted in an evenly split panel, the members, had they followed the oral instructions in the record, and contrary to the legal requirements, would never have sought further instructions for reconsideration, because as instructed, an initial vote that resulted in an evenly split panel would not have resulted in an acquittal. It would have resulted in nothing.

We realize that there is tension between the instructions captured orally on the record and the instruction given to the members in writing.[3] No one noted that tension prior to our reading of the record. While we generally are willing to presume members follow the instructions given,[4] we are left pondering whether the written instructions were read by the members, and if so, which instructions they followed. Additionally, the record before us presents more irregularity than the tension between the two versions of the findings instructions.

Deliberations on Findings

The military judge placed the members in recess at 1605 on 24 June 2011, without giving the standard instructions cautioning members to delay deliberations until placed alone in

[3] We note that the written instructions submitted to the members correctly stated that "[i]f fewer than three members vote for a finding of guilty, then your ballot resulted in a finding of not guilty." Appellate Exhibit XII at 6. The military judge's oral instructions included in the record departed from a correct statement of law. We also note that the record before us was reviewed by the trial counsel, defense counsel, and authenticated by the military judge as an accurate account of the proceedings. Unfortunately, this is not the only error contained within this record. We accept this as an accurate transcript, and proceed with our review.

[4] *United States v. Peebles*, 45 C.M.R. 406 (A.C.M.R.), *rev'd on other grounds*, 45 C.M.R. 240 (C.M.A. 1972)(when the trial court noted when the members entered their deliberations and were otherwise correctly instructed, the court presumed they properly executed their duties).

a closed session. The next entry in the record of trial shows the members returning at 1728 with their findings. *Id*. at 351. The court was never re-assembled following the recess and was not formally closed for deliberations on the record. We are unable to determine when the members entered their deliberations, or whether they began their deliberations only when all were once again present, as the military judge failed to note when or if all members entered closed session deliberations. While we might otherwise conclude that in the absence of evidence to the contrary, neither intrusion nor irregularity occurred, the totality of this record calls into question the basis of that presumption. Additionally, the members were not properly instructed on the record.

Sentencing

During sentencing, the members returned with a sentence (not announced in court) of reduction to E-1, forfeitures of $730.00 pay per month for three months, confinement for 120 days, and an other–than-honorable discharge.[5] The military judge instructed the members that an administrative discharge was not authorized, and then asked: "[w]ould you like to resume your deliberations and correct any punishments that are not authorized on the sentencing worksheet?"[6] *Id*. at 372. The military judge noted he would not give the members another sentencing worksheet. *Id*. at 374. Despite that exchange, the members returned with a new worksheet,[7] and announced a sentence of confinement for 90 days, reduction to pay grade E-1, forfeitures of $978.00 pay per month for three months, and a

[5] Although the sentencing issue does not directly call into question the findings, presuming regularity where the record suggests that the members did not follow the sentencing instructions gives us pause regarding the regularity of the findings process, already questionable in view of the judge's conflicting instructions.

[6] We are aware that the administrative discharge awarded by the panel initially resulted in an unlawful sentence that had no legal status. *United States v. Perkinson*, 16 M.J. 400, 402 (C.M.A. 1983) (where a panel returns with a sentence that includes an administrative discharge, there was no error where the military judge instructed the court that the sentence was unlawful, that an administrative discharge was not authorized, and that the court should go "out to deliberate again and vote anew on the sentence").

[7] This intrusion into the closed session underscores our lack of confidence in a presumption of regularity that might otherwise attach to the deliberations on findings conducted in the absence of formally closing the court for findings.

bad-conduct discharge.[8] While the panel may have followed the initial instructions on voting in arriving at the adjudged sentence announced in court, in doing so, it appears to have exceeded the limited, and perhaps incorrect, instruction by the judge to correct any punishments that were not authorized.

Clemency Recommendation

After the members departed, the trial defense counsel asked whether the military judge would be willing to provide a recommendation regarding the sentence, in light of the sentencing landscape just described. The military judge responded by stating that "[u]nfortunately, I am not the sentencing authority. I don't have the authority to make a recommendation with regard to sentence." When the clemency submission was offered by the defense bringing this matter to the attention of the convening authority, the staff judge advocate merely noted that the defense raised allegations of legal error, stating that he disagreed with the allegations of error. While the appellant has not complained that the military judge should have tailored his instructions regarding continuing the sentencing deliberations to address the possibility of a clemency recommendation, we note that this situation was addressed by the Court of Military Appeals in *United States v. Perkinson*, 16 M.J. 400 (C.M.A. 1983). As in *Perkinson*, we find that the judge did not err in this regard, but we note that the better practice would have been to do so, particularly where the judge believed he himself was not authorized to offer one. The members appeared to desire an administrative discharge, but were unable to impose one because of the law. We are troubled by the fact that the instruction offered by the military judge, while not fatally defective, did not completely address the situation presented. The better practice would have been to instruct the members both that they were limited in their discretion, but that they did have the ability to recommend, as a matter of clemency, the resolution they desired. We are also troubled that the staff judge advocate did not specifically call this matter to the attention of the convening authority, despite the fact that the defense counsel raised the issue in his clemency submission.

Conclusion

[8] The only mention of the new worksheet on the record is the military judge's final remarks to the bailiff, asking him to collect "the previous" worksheet. *Id*. at 377. The first, defective, worksheet is also attached, but it was altered after it was reviewed by the military judge. It bears a line through both the words "bad-conduct" and the words "other than honorable."

This record calls to mind Judge Crawford's language in *Jones*:

> We emphasize in the strongest possible terms that the administrative instruction in the Benchbook be given by all judges prior to deliberation on findings and sentence. . . . We have good reason to be proud of the military criminal justice system. In many instances it is a system that extends to servicemembers more rights and protections than those enjoyed by their counterparts in the civilian community. But it is often not enough that the military justice system be fair. It must also be perceived as fair by those men and women subject to the Uniform Code of Military Justice.

United States v. Jones, 37 M.J. 321, 324 (C.M.A. 1993). While the court in *Jones* ultimately found no prejudice, the errors before us are more than mere formality, and call into question both the legality and the perception of fairness of this trial. We conclude that the appellant had a right to be acquitted if less than two-thirds of the panel voted to convict, absent a proper reconsideration. Article 52(a)(2), UCMJ; RCM 921(c)(3); *United States v. Nash*, 18 C.M.R. 174 (C.M.A. 1955). The instructions failed to inform the members of that right. Under these circumstances, we find error requiring reversal. Art. 59(a), UCMJ. As to the additional errors, although there were no objections, even if a plain error analysis might apply, we would decline to apply the doctrine of waiver because of the totality of the errors in this case. *United States v. Nerad*, 69 M.J. 138, 146-47 (C.A.A.F. 2010). This case presents more than a question of whether the court followed the procedures to close for deliberations. It presents a question of whether the findings and sentence can be upheld when the trial judge errs by closing the court without those procedures, arms the panel with erroneous oral instructions on findings, and when the panel fails to follow the initial sentencing instructions of the military judge and utilizes a sentence worksheet provided off the record and during deliberations.

The findings and sentence, under these circumstances, should not be approved. We therefore set them aside. Art. 66(c), UCMJ. A rehearing is authorized.

Senior Judge PAYTON-O'BRIEN and Senior Judge MAKSYM concur.

For the Court

R.H. TROIDL
Clerk of Court